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NO. 81 6540

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

HENRY ARTHUR DRAKE,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Georgia Rule prohibiting the granting of a new trial on the basis that a witness has recanted his trial testimony denies Petitioner fundamental fairness and due process of law where Petitioner's convictions could not stand without the trial testimony of the witness who has now recanted that testimony, admitted that it was perjured and exculpated the defendant.

II. Whether the imposition of the death penalty on a defendant would constitute cruel and unusual punishment in violation of the Eighth Amendment where the sufficiency of the conviction upon which that penalty was based rests squarely on the testimony of a witness who has now recanted that testimony, admitting that it was perjured, and has exculpated the defendant of the crimes, and where the state has invoked a rule barring a new trial on the basis of the witness' recanting of his trial testimony.

PREFATORY STATEMENT

All references to the trial transcript in this case will be preceded by the capital letter "T" followed by the page reference, e.g. "T.3". All references to the transcript of the Co-Defendant's trial will be preceded by the capital letter "CT" followed by the page reference, e.g. "C.T. 3". All references to the hearing on the Extraordinary Motion for New Trial held on July 7, 1981, will be preceded by the capital letters "HT" followed by the page reference, e.g. "HT. 4".

All references to the record in the Georgia Supreme Court will be preceded by the capital letter "R" followed by the page reference, e.g. "R:4". All references to the appendices will be preceded by the capital letter of the particular appendix followed by the page reference, e.g. A-5.

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HENRY ARTHUR DRAKE,

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Vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

The Petitioner, HENRY ARTHUR DRAKE, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia affirming the denial of his Extraordinary Motion for New Trial on charges of murder and armed robbery.

OPINIONS BELOW

On July 24, 1981, the Superior Court of Butts County, Georgia entered an order (copy attached as Appendix A) denying Petitioner's Extraordinary Motion for New Trial on charges of murder and armed robbery for which Petitioner is currently facing sentences of death and life imprisonment, respectively. On February 9, 1982, the Supreme Court issued an opinion affirming the trial court's order (copy attached as Appendix B). It is from this decision that Petitioner now appeals.

JURISDICTION

Jurisdiction of this appeal is grounded on the July 24, 1981 order of the Superior Court of Butts County denying Petitioner's Extraordinary Motion for New Trial and on the February 9, 1982 decision of the Georgia Supreme Court affirming that trial court order.

The jurisdiction of the Supreme Court is invoked pursuant to this court's ability to review and decide any title, right, privilege or immunity, specifically set up or claimed under the Constitution of the United States. 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the Eighth Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States which provide as follows:

Amendment VIII:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV (Section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case involves Article 1, Section 1, Paragraph 1 of the Constitution of Georgia of 1976 which provides as follows:

Art. I, Sec. I, Paragraph I: (Ga. Code Ann. §2-101)

> No person shall be deprived of life, liberty, or property, except by due process of law.

STATEMENT OF THE CASE

Facts and How the Federal Questions Were Raised Below (For the sake of clarity and brevity and to avoid undue repetition, these two sections have been combined):

On September 1, 1977, Petitioner was convicted of the murder and armed robbery of a Colbert, Georgia barber and was sentenced to death and life imprisonment, respectively, for those crimes. His convictions were affirmed on direct appeal by the Georgia Supreme Court. Drake v. State, 241 Ga. 583 (247 SE2d 57)(1978), cert. denied, 440 U.S. 928, 99 S.Ct. 1265, 59 L.Ed.2d 485 (1979).

Subsequently, a State Petition for Writ of Habeas Corpus was filed but denied at the lower court level. The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause, and this Court denied certiorari over the dissent of Justices Brennan, Marshall, Stewart and White. Drake v. Zant, S.Ct. #79-6615, decided November 17, 1980.

The key prosecution witness against the Petitioner at trial was William Campbell, a co-defendant who had been separately tried and convicted for the same crimes almost a year before Petitioner's trial. Campbell's testimony at both his own trial and that of Petitioner was that Petitioner committed the crimes and that Campbell witnessed the crimes as an innocent bystander. Campbell was the only witness to implicate Petitioner in the crimes while there were eye-witnesses who placed Campbell at the scene. Petitioner maintained his innocence throughout the proceedings, taking the stand in his own defense and denying Campbell's allegations.

On April 2, 1981, Campbell executed a sworn affidavit (attached hereto as Appendix C and to Appellant's Extraordinary Motion for New Trial as Exhibit A, R: 18-19) admitting that he lied when he testified that Henry Drake committed the crimes against the barber and further admitting that he alone and not

Drake, was responsible for the death and robbery of the barber. On the basis of this affidavit an Extraordinary Motion for New Trial was filed on Petitioner's behalf. (R:14-25).

A hearing on said motion was scheduled for July 7, 1981, at the Elbert County courthouse. Petitioner filed a timely motion to be present at this hearing (R:42-43); however, said motion was denied (R:46), and the hearing was held without the Petitioner's presence over the objection of Petitioner's counsel (HT:3-4).

At the hearing Campbell reiterated what he had said in his affidavit. His testimony was that he lied at both his own trial and Petitioner's trial when he testified that Petitioner beat and robbed the barber and furthermore, that it was he alone, and not Drake, who committed the crimes. (HT:9, 12-16, 22, 26-35, 43-44, 47, 52, 60-61). He explained that he lied and blamed the crimes on Drake because he was mad at the Petitioner. (HT:22). He testified that at first he was mad because he thought Petitioner had informed the authorities where he could be located. He believed this because when the Georgia authorities came to Virginia to pick him up they had the watch which Campbell had taken from the barber and had given to Petitioner before leaving Georgia (HT:23-24). He also believed that Petitioner had turned him in because the police were waiting for him at the bus station in Norton, Virginia and the Petitioner was the only one who knew where he was going. (HT:25-26). He remained angry at Petitioner because Drake treated him ugly when the authorities brought him back for trial telling Campbell he hoped he would 'get the chair' before his trial and that he and his family were glad Campbell 'got the chair' after Campbell had been convicted and sentenced to death. (HT:27-29). Campbell testified that he wanted to pay Petitioner back for the way he treated him (HT:27-29).

Despite Campbell's testimony that he had lied at Petitioner's trial and that the Petitioner did not commit the crimes of which he was convicted, which testimony was unrefuted by any evidence from the state, and despite Petitioner's contentions that to deny him a new trial under the facts of this case would be a violation of his rights under the Constitution of the United States, the trial court entered an order denying the Petitioner's motion for a new trial. (R:78). (See Appendix A hereto).

Petitioner appealed the trial court's ruling once again urging that the denial of a new trial in his case would violate the fundamental rights guaranteed him by the Eighth and Fourteenth Amendments to the United States Constitution. (p.30-31, Brief of Appellant, R:84-85). However, the Supreme Court issued an opinion affirming the trial court's denial of the Extraordinary Motion for New Trial on February 9, 1982. (See Appendix B hereto).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A STATE RULE BARRING A NEW TRIAL ON THE BASIS THAT A WITNESS HAS RECANTED HIS TRIAL TESTIMONY VIOLATES STANDARDS OF FUNDAMENTAL FAIRNESS AND DUE PROCESS EMBODIED IN THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT OPERATES TO DENY A NEW TRIAL TO A DEFENDANT WHO RECEIVED THE DEATH PENALTY FOR MURDER AND A LIFE SENTENCE FOR ARMED ROBBERY WHERE THE SOLE WITNESS TO IMPLICATE THAT DEFENDANT IN THE MURDER AND ROBBERY, AND WITHOUT WHOSE TESTIMONY THE CONVICTIONS OF THE DEFENDANT COULD NOT STAND, HAS NOW RECANTED THAT TESTIMONY, ADMITTING THAT IT WAS PERJURED, AND HAS EXCULPATED THE DEFENDANT.

Under Georgia law new trials on the basis of newly discovered evidence are mandated if the newly discovered evidence meets the following six criteria: (1) that the evidence has come to the knowledge of the Petitioner since trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that the only effect of the evidence will not be to merely impeach the credit of a witness. However, if any of the requirements are not met then a new trial will not be granted. Bell v. State, 227 Ga. 800, 805 (183 S.E.2d 357)(1971), Timberlake v. State, 246 Ga. 488, 491 (271 S.E.2d 792)(1980) and see Drake v. State, (attached hereto as Appendix B).

The Georgia Supreme Court upheld the denial of a new trial in Petitioner's case, opining that "Pretermitting the question of whether the 'newly discovered evidence' meets the first five of the above requirements, it is clear that the effect of Campbell's new testimony is to impeach the credibility of his earlier sworn statements. The law is settled that a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 SE2d 597)(1981); Sutton v. State, 238 Ga. 336, 338 (232 SE2d 569)(1977); Fowler v. State, 187 Ga. 406 (1 SE2d 18)(1939);

Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 SE2d 672)(1974); Code Ann. §70-204."

Initially Petitioner would assert that contrary to the Georgia Supreme Court's ruling his Extraordinary Motion for New Trial met each of the requirements above, including the sixth requirement. However, it is the Petitioner's contention that the denial of the Extraordinary Motion for New Trial in his case on the basis stated by the Georgia Supreme Court is a violation of the rights guaranteed to all citizens by the Eighth and Fourteenth Amendments to the United States Constitution.

The most obvious problem with the Court's ruling is that a witness' recantation of his trial testimony will always have the effect of impeaching the "credibility of his earlier sworn statements". Moreover, to hold that a post-trial declaration by a State's witness that his former testimony was false can never be a ground for a new trial is not only an erroneous interpretation of prior Georgia law but, more importantly, it completely prevents a convicted defendant in Petitioner's shoes, no matter how innocent he may in fact be, from contesting his guilt or from establishing that his conviction was based on perjured testimony by way of newly discovered evidence.

Petitioner's case poses a rare situation in which the only witness to implicate the Petitioner in the crimes has now admitted, under oath, that Petitioner was not the perpetrator. It is the Petitioner's misfortune that this witness was not only the sole witness to testify as to Petitioner's alleged commission of the crimes, but he was also the only person present when the crimes were allegedly committed.

Let us assume for a moment that Petitioner is in fact innocent and that, as Petitioner has always maintained, and as Campbell now testifies, Petitioner let Campbell out to get a haircut with no knowledge or intention that Campbell do anything but get his hair cut; that Campbell alone, for whatever reason,

fought with and robbed the barber; that Petitioner and his girlfriend Mary Carruth picked Campbell up from across the street at the laudromat on their way back from Petitioner's mother's; that upon returning to Madison Campbell told them that he had fought with and hurt the barber; that Campbell believed that Petitioner had turned him in and therefore tried to lay the crime upon Petitioner by first lying to the police and then to the juries in his and Petitioner's trials. Assuming these facts, where there are no other eye-witnesses to the crime, Petitioner has no way of proving that Campbell lied when he testified at Petitioner's trial that Petitioner was the assailant except by Campbell's own admission that his testimony was perjured and that Drake is, in fact, innocent.

Yet, the Georgia Supreme Court's ruling denying Petitioner a new trial forecloses to Petitioner any forum in which to present the newly obtained evidence indicating that he is innocent of the crimes for which he has been imprisoned and now faces a sentence of death, as well as any forum in which to demonstrate that his convictions for those crimes were based upon perjured testimony.

As the Supreme Court itself noted in its opinion denying Petitioner's Motion for New Trial when it quoted from its opinion affirming Petitioner's convictions on direct appeal, the "State's case rested largely on Campbell's testimony, since there was no other direct evidence, and little circumstantial evidence of Drake's participation in the crime". (Georgia Supreme Court Order attached hereto as Appendix B at page 3 quoting from Drake v. State, 241 Ga. 583 at 584. (247 SE2d 57)(1978).) Indeed, not only did the facts of the case not strongly point to Petitioner's guilt but the Petitioner and three alibi witnesses testified that Petitioner was not even at the scene of the crime at the time that the crimes took place.

The new evidence presented by Petitioner's Extraordinary Motion for New Trial (Campbell's affidavit and testimony recanting his original testimony) gives every indication not only that Petitioner is in fact innocent, but also that the only witness to implicate Petitioner in the crimes committed perjury in doing so. Petitioner's case is not one in which the recanting witness' original testimony could be considered disinterested and facially credible. Instead, Campbell's original testimony arose from powerful motives of self-protection and revenge. Furthermore, Campbell had a long history of criminal conduct at the time of his trial testimony. Given the state of the record and the nature of the new evidence presented by Petitioner's motion in addition to the fact that the jury which convicted him took over six hours to do so, a new jury given the benefit of the new evidence might well decide that there is a reasonable doubt as to the Petitioner's guilt.

Nevertheless, the Georgia Supreme Court would send Petitioner, against whom the Court itself admits that the sufficiency of the evidence at trial was marginal, to the electric chair without even allowing him to place this evidence before a jury.

To deny Petitioner's a new trial under these circumstances is to deny him the due process of law upon which justice in this country is based. Moreover, the imposition of the death penalty in this case without having given Petitioner the opportunity to defend his life before a jury who had been apprised of Campbell's recantation and exoneration of Petitioner would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution and would result in an act of manifest injustice and inhumanity.

In death penalty cases the interest in reliability of the guilt/innocence determination and in procedural fairness is far

more acute because, as this Court has recognized, death is different both in its severity and finality. Though written in the context of a presentence report considered at the punishment phase the following words of Mr. Justice Stevens in Gardner v. Florida, supra, are equally applicable under the circumstances of this case:

> "[I]f the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death."

Petitioner only asked of the Georgia Courts that he be given the time and opportunity to present in newly discovered evidence of his innocence to a jury which can then determine his guilt or innocence in light of that new evidence. However, the Georgia Courts ruled that under Georgia law a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial, thus procedurally foreclosing Petitioner from seeking to establish that he is innocent and that his convictions were based on perjured testimony.

The evidence upon which Petitioner was convicted was of questionable sufficiency to begin with, and the witness who supplied the sole evidence implicating Petitioner with the crimes has now given sworn testimony that that evidence was false. It is Petitioner's contention that not only would time most certainly be well spent and procedural fairness and civilized justice well-served by a new trial being provided and a new jury empanelled to redetermine Petitioner's guilt or innocence in light of the new evidence of his innocence, but that due process and the prohibition against cruel and unusual punishment require such a new trial.

This Court upheld Georgia's death penalty statute only on the basis that convictions upon which the death penalty was given as the punishment would be carefully reviewed so as to insure

that constitutional rights were scrupulously honored to eliminate as much as possible the chance that an innocent person might suffer the irreversible consequences of the imposition of that sentence. All that Petitioner seeks is an opportunity to present to a jury what could well be evidence sufficient to persuade that jury that Petitioner is not guilty.

The denial of Petitioner's Extraordinary Motion for New Trial illustrates that the Georgia Supreme Court has abandoned its duty to conduct a careful and conscientious review of this death penalty case in the spirit approved by this Court and has instead conducted a mere "rubber stamp" review of the lower court's ruling. Therefore, the death penalty as applied in this case is unconstitutional. This Court should accept certiorari to determine if Petitioner's contentions are correct.

CONCLUSION

For all the foregoing reasons Petitioner asks that the Court grant a Writ of Certiorari and undertake to determine the significant and important issues raised in his Petition.

Respectfully submitted,

MARTIN & YOUNG, P.C.

By: John R. Martin by MJW
JOHN R. MARTIN

By: Mary J. Wilkes
MARY J. WILKES

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JUL 27 Recd

IN THE SUPERIOR COURT FOR THE COUNTY OF MADISON

STATE OF GEORGIA

STATE OF GEORGIA	)	CRIMINAL ACTION NO. 5972G
	)	
	)	
VS	)	MURDER--ARMED ROBBERY
	)	
	)	
HENRY ARTHUR DRAKE	)	EXTRAORDINARY MOTION FOR NEW TRIAL
	)	

O R D E R

Defendant having filed an Extraordinary Motion for New Trial, and same having come on for a hearing before this Court on July 7, 1981, and the Court having heard and considered all the evidence presented, and the parties having filed briefs, and the Court having studied same, and the Court having heard from counsel orally at said hearing, and the Court having studied and reviewed the trial transcript in full, this Court finds that there is no valid legal reason that requies a new trial in said case and, therefore, the Extraordinary Motion for New Trial made by the Defendant must be denied.

NOW, THEREFORE, said Extraordinary Motion for New Trial is hereby denied. The Court further denies the State's Motion to Strike certain material in said Extraordinary Motion for New Trial.

SO ORDERED.

This 24th day of July, 1981.

William F. Grant

WILLIAM F. GRANT
Judge, Superior Courts
Northern Judicial Circuit

APPENDIX A

FEB 1 1 RECD

In the Supreme Court of Georgia

Decided: FEB 9 1982

38034, 38272. HENRY ARTHUR DRAKE v. THE STATE

GREGORY, Justice.

In case No. 38034 Henry Arthur Drake appeals from the denial of his extraordinary motion for new trial based on newly discovered evidence.

Drake was convicted of the armed robbery and murder of a Madison County barber. He was sentenced to death for the murder and life imprisonment for the armed robbery. We affirmed his convictions on appeal. Drake v. State, 241 Ga. 583 (247 SE2d 57) (1978), cert. denied, 440 U. S. 920 (99 SC 1265, 59 LE2d 485) (1979).

Prior to Drake's trial, his co-indictee, William Campbell, was tried and convicted of the armed robbery and murder. Campbell was sentenced to life imprisonment for the armed robbery and death for the murder. Campbell's convictions were affirmed on appeal. See, Campbell v. State, 240 Ga. 352 (240 SE2d 828) (1977), cert. denied, 439 U. S. 882 (SC , LE2d) ( ). At Campbell's trial, Campbell testified that he and Drake had been drinking prior to going to the victim's barber shop. Campbell maintained that over his protests, Drake had bludgeoned the barber with a claw hammer, then robbed him.

Campbell testified that, after striking the barber, Drake hit Campbell in the head with the hammer, then picked him up and placed him next to the door. Campbell testified

that when Drake helped him up to leave, he noticed blood on the floor. The State introduced into evidence a small knife found at the scene of the crime which matched the description of a knife belonging to Drake. Campbell testified that he had never seen this knife before. The State presented evidence that there had been a struggle in the barber shop of a "violent and brutal nature." Campbell, supra, at 352. "Blood [was] smeared all over the whole barber shop and everything in the barber shop." Campbell, at 353. The State also showed that, at the time of Campbell's arrest in Virginia, he was wearing the band to a watch which had belonged to the victim. The victim's watch was found at the residence Campbell and Drake shared. Drake did not testify at Campbell's trial.

At Drake's trial Campbell testified that, over his protests, Drake "struggle[d] with the victim until [the barber] passed out from blows to his head." Drake, supra, at 584. The State also showed that "the victim was over 70 years old, but he was healthy...Campbell was in his sixties, and suffered so severely from asthma and emphysema that he could not exert himself strenuously. Drake, on the other hand, was healthy and in his thirties. From this the State argued that Drake must have been the one who actually beat the victim." Ibid.

Drake maintained his innocence at trial. He testified that he was visiting his mother at the time of the offense. Drake's alibi was corroborated by Mary Caruth with whom Drake and Campbell lived. Drake's mother also testified that her son was with her at the time of the crime. There was undisputed evidence that Caruth and Drake drove Campbell

to the barber shop, drove him to their home later in the afternoon, and then drove him to Atlanta so that "he could flee the state even though by that time Drake admittedly knew of Campbell's involvement in the crimes." Drake, supra, at 586.

We noted, in reviewing Drake's convictions, that the "State's case rested largely on Campbell's testimony, since there was no other direct evidence, and little circumstantial evidence of Drake's participation in the crime." Id. at 584.

In April, 1981, Campbell signed an affidavit stating that he lied at Drake's trial and that Campbell, not Drake, had been responsible for the murder of the barber. The affidavit alleges that Drake and Caruth dropped Campbell off at the barber shop, then drove away. Campbell states that the barber "messed [his] hair up;" that he tried to get the barber to "fix it," but the barber refused, that the barber "got mad and hit [Campbell] with a hammer," whereupon Campbell drew a small knife belonging to Drake, took the hammer away, then beat and robbed him. The affidavit states that, afterwards, Campbell waited for Drake and Caruth to pick him up. He informed them that he was in trouble and gave Drake the victim's watch. Drake later took Campbell to Atlanta where Campbell boarded a bus to Virginia.

Campbell's affidavit asserts that he implicated Drake in the crimes because he believed Drake had informed the authorities that he could be located in Virginia. The officer who arrested Campbell in Virginia had the victim's watch in his possession. Campbell states that since he had earlier given this watch to Drake, he had reason to believe

Drake led the authorities to him. Campbell's affidavit states that he testified against Drake at Drake's trial because Drake had told him after Campbell's conviction that he was glad Campbell "got the chair," and that he is recanting his earlier testimony because he 'know[s] it was wrong to lie" and he desires "to be forgiven."

At the hearing on the extraordinary motion for new trial Campbell testified that the barber struck the first blow and that he beat the barber in self-defense. Campbell explained that he had taken Drake's knife from him before going to the barber shop. When the barber attacked him, Campbell stabbed him "once or twice" with the knife, but found it "didn't do no good." He threw it on the floor of the barber shop where it was later found by the police. Campbell further testified that, while his health was so poor he could "hardly walk a block without giving out," he and the barber "scuffled all the way to the back" of the barber shop. He also testified that there was "not a lot of blood" in the shop when he left, and that the barber, while conscious, was unable to move.

Drake's attorney introduced into evidence an affidavit from another attorney who had represented Drake at his habeas corpus hearing, stating that in "May or June, 1979" Campbell had informed him that Campbell had committed the crime and that Drake was not involved. On cross-examination Campbell denied knowing the other attorney or ever making this statement to him.

(1) "The standard for granting a new trial on the basis of newly discovered evidence is well established. 'It is incumbent on a party who asks for a new trial on the

ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.' Emmett v. State, 232 Ga. 110, 117 (205 SE2d 231) (1974); Bell v. State, 227 Ga. 800, 805 (183 SE2d 357) (1971); Burge v. State, 133 Ga. 431, 432 (66 SE 243) (1909); Berry v. State, 10 Ga. 511, 527 (1851); see Code Ann. § 70-204. All six requirements must be complied with to secure a new trial. Offutt v. State, 238 Ga. 454, 455 (233 SE2d 191) (1977); Corn v. State, 142 Ga. App. 798, 799 (237 SE2d 203 (1977)." Timberlake v. State, 246 Ga. 488, 491 (271 SE2d 792) (1980).

Pretermitting the question of whether the "newly discovered evidence" meets the first five of the above requirements, it is clear that the effect of Campbell's new testimony is to impeach the credibility of his earlier sworn statements. The law is settled that a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 SE2d 597) (1981); Sutton v. State, 238 Ga. 336, 338 (232 SE2d 569) (1977); Fowler v. State, 187 Ga. 406 (1 SE2d 18) (1939); Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 SE2d 672) (1974); Code Ann. §70-204.

Further, inconsistencies between the testimony Campbell now offers and other evidence presented on the trial of the case cast serious doubt on the credibility of his latest testimony. Campbell's testimony at the hearing on the extraordinary motion for new trial that he was the sole perpetrator of the crime contradicts his trial testimony that, at the time of the crime, his health was so impaired he was incapable of strenuous physical exertion. Campbell's current testimony that there was "not much blood" in the barber shop when he left the victim conflicts with evidence introduced at trial showing that "blood was smeared all over" the barber shop.

"All applications for new trial upon the ground of newly discovered evidence are addressed to the sound discretion of the trial judge, and unless it affirmatively appears that he has abused his discretion in overruling the same, his discretion will not be controlled." Kitchens v. The State, 228 Ga. 624, 626 (187 SE2d 268) (1972); Carter v. State, 246 Ga. 328 (271 SE2d 475) (1980); Pullin v. State, 237 Ga. 759 (229 SE2d 606) (1976). We conclude that the trial court did not abuse its discretion in denying Drake's extraordinary motion for new trial.

(2) Drake's contention that the trial court erred in denying his motion to be present at the hearing on the extraordinary motion for new trial is, likewise, without merit. "In Georgia, as in most jurisdictions, the general right of one accused of a felony to be present during the course of his trial does not extend to post-verdict pro-

cedures such as a motion for new trial, at which only questions of law, not questions of fact are determined." Dobbs v. The State, 245 Ga. 208 (264 SE2d 18) (1980). Contrary to Drake's position, the trial court did not abuse its discretion in denying this motion.

(3) Following the trial court's denial of the extraordinary motion for new trial, the State made a motion to delete from the record on appeal a brief and memorandum of law submitted by Drake in favor of the extraordinary motion for new trial, Campbell's affidavit recanting his trial testimony and a letter written by Drake's attorney to the district attorney of the Northern Judicial Circuit. At the hearing on the motion to correct the record, the State took the position that, since none of these documents had been offered in evidence at the hearing on the extraordinary motion for new trial, they were not properly a part of the record on appeal. The trial court agreed and ordered the documents deleted from the record. In case No. 38272 Drake appeals from that decision.

We find that, even if the trial court committed error in deleting these documents from the record, Drake has not shown how he was harmed by this error. We have studied the excluded brief and memorandum of law and find that they contain essentially the same arguments made in Drake's brief to this court in case No. 38034. A copy of Campbell's affidavit, attached to Drake's extraordinary motion for new trial, was properly made a part of the record transmitted to this court in case No. 38034; Drake cannot complain that he was harmed by the trial court's exclusion of an additional copy. Nor can we agree with Drake's contention that he was harmed by the exclusion of a letter to the district

attorney outlining Drake's intention to file an extraordinary motion for new trial.

Last, Drake argues that the trial court erred in denying his oral motion to have a letter to the district attorney included in the record in case No. 38034. This letter, which we now have before us, purports to confirm a phone conversation in which the district attorney stated he would not seek an indictment against William Campbell for perjury. Drake contends that this letter indicates a lack of good faith on the part of the State because the State is arguing that Drake's extraordinary motion for new trial should be denied since Campbell has not been convicted of perjury, while refusing to seek an indictment against Campbell for this offense. As this argument by the State is not relevant to our determination that the trial court did not err in denying the extraordinary motion for new trial, we find no harmful error in excluding this letter from the record.

Judgment affirmed in cases 38034 and 38272. All the Justices concur, except Hill, P. J., and Clarke, J., concur in the judgment only and Weltner, J., concurs specially.

Please substitute this page for the one previously sent to you

FEB 17 Recd

38034, 38272. HENRY ARTHUR DRAKE V. THE STATE

WELTNER, Justice, concurring specially.

The only principles necessary to resolve the issues presented by this case are those set out in the First Division of the opinion, specifically, "a new trial will not be granted if the only effect of the evidence will be to impeach the credit of the witness" and "a post-trial declaration by a State's witness that his former testimony was false is not ground for a new trial."

As Drake's contentions clearly fall within one or both of these principles, the Second and Third Divisions of the majority opinion should fall to the venerable but valid precept known as "Occam's Razor" [essentia non sunt multiplicanda praeter necessitatem], standing for the proposition that matters must not be multiplied beyond necessity.

I am authorized to state that Mr. Justice Smith joins in this concurrence.

38034, 38272. HENRY ARTHUR DRAKE v. THE STATE.

HILL, Presiding Justice, concurring specially.

I write to explain my inability to agree with either the majority opinion or the concurring opinion.

First, to put this case in perspective, it should be noted that here the trial judge heard the extraordinary motion for new trial on its merits. Thus, the pleading requirements of Dick v. State, ____Ga.____ (38103, decided Feb. 9, 1982), are not involved here.

Second, after hearing Campbell's testimony offered in support of the extraordinary motion, the trial judge denied the motion. The majority opinion points out that there is serious doubt as to the credibility of Campbell's testimony at the hearing. The majority opinion then proceeds to find that the trial judge did not abuse his discretion in overruling the extraordinary motion. I agree with the majority opinion in so finding.

The specially concurring opinion contends that the majority should not have reached the questions of credibility and discretion but should have concluded when it found that "'a new trial will not be granted if the only effect of the evidence will be to impeach the credit of the witness' and 'a post-trial declaration by a State's witness that his former testimony was false is not ground for a new trial.'" With this contention in the specially concurring opinion I cannot agree, and its inclusion in the majority opinion causes me to be unable to adopt that opinion.

It is correct that "a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness" (emphasis supplied), such as a "newly discovered" witness who says "I wouldn't believe the

state's witness under oath." However, when the state's eyewitness recants his trial testimony, the effect is not "only" to impeach his credibility; it casts doubt on the proof used to convict and the correctness of the guilty verdict. Therefore, in my view (and from the majority's reliance on Campbell's credibility and the trial judge's discretion, I assume in their view) the trial judge was correct in conducting the hearing so as to hear Campbell's testimony, rather than refusing to hear the matter on the ground that "a post-trial declaration by a State's witness that his former testimony was false is not ground for a new trial."

This statement as to post-trial declarations of the state's witnesses is necessarily wrong. Assume that in a trial for rape the victim testified that the defendant entered her home, threw her on the bed, raped her, and fled as her husband returned home. The husband testified he saw the defendant fleeing from the house as he arrived. The defendant claimed consent but the jury found him guilty. After conviction and appeal, the state's key witness (the victim) says under oath that she was not raped, that she had been having an affair with the defendant, that the defendant fled when they heard her husband approaching, and that she concocted the rape story to cover up the affair she was having with the defendant. Would a court hold that "a post-trial declaration by a state's witness that her former testimony was false is not ground for a new trial"? Would a court hold that a trial judge who granted an extraordinary motion for new trial in such a case was without authority to do so? I doubt it.

In the case before us, I agree that it has not been shown that the trial judge, after hearing Campbell's testimony, abused his discretion in denying the extraordinary motion for new trial. I therefore concur in the judgment.

COUNTY OF BUTTS
STATE OF GEORGIA

A F F I D A V I T

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths in the State of Georgia, WILLIAM CAMPBELL, who, after first being duly sworn, deposes and states as follows:

My name is William Campbell and I was a witness in the trial of Henry Arthur Drake for armed robbery and murder. I lied at this trial. I said Henry was the one who killed the barber, Mr. Eberhart, and that I tried to stop Henry from killing him. But what I said were lies. I was the one who killed Mr. Eberhart. Henry wasn't even there. He didn't have anything to do with it.

He and Henry were going to Colbert. Henry was going to see his mamma and he dropped me off at the barber shop and was going to pick me up on his way back to Madison. I went to the barber shop and Mr. Eberhart cut my hair, but he messed my hair up. I tried to get him to fix it but he wouldn't. He got mad and hit me with a hammer. I pulled my knife to try to get the hammer from him. I stabbed him but the blade broke off. I got the hammer away and beat him up. I saw his watch and took it and took about $400.00 out of his pocket, too.

I left the barber shop and waited behind a laundromat until I saw Henry come back. I got in the truck. (I noticed Henry's girl friend had a bowl of Henry's mamma's soup on her lap.) I told Henry about the fight and I told him I thought I might have killed the barber. Henry had to go back to his mamma's for a few minutes. He came back out with a coat or something. Then we went back to Madison.

During the night Henry went back to Colbert to see how the man was doing. In the morning he told me Mr. Eberhart was doing real bad and I'd better leave. I asked Henry to take me to Atlanta. I gave Henry Mr. Eberhart's watch. Henry took me to Atlanta and I stayed there a few days and then took the bus to my hometown, Norton, Virginia. While I was there I robbed a pawn shop and was arrested and got twenty years for armed robbery.

While I was in jail in Virginia an officer from Georgia came to question me about the barber's murder. I figured Henry must have turned me in--told everything and where I was because the officer had the watch that I'd given Henry. I told the officer I didn't kill Mr. Eberhart. I said Henry did it and I said I tried to stop Henry. I didn't do nothing but lie. I lied about Henry because I thought Henry had done me dirty. I thought Henry had turned me in and the way Henry treated me when I came back to Georgia made me keep on lying. Henry was ugly to me at the jail and after my trial, Henry said he and his whole family were glad I got the chair.

But since being here at Jackson I've thought it over and I know it was wrong to lie and I can't go on living like this. I've changed my way of living now. I'm living better and doing right now. I know what I'm saying might hurt my own appeals but I'm not going to worry about it. I don't want to go on lying. I want to get this off my conscience and try to be forgiven by Henry and God Almighty.

I'm willing to go to court to say that I lied in Henry's trial. Also this affidavit may be used in any way that will help change the wrong that I've done.

William B Campbell
WILLIAM CAMPBELL

Sworn to and subscribed before me
this the 29 day of April, 1981

Linda Hunt
Notary Public, Georgia State
at Large. My commission expires
Aug 20, 1984.

FEB 12

38034, 38272. HENRY ARTHUR DRAKE v. THE STATE

Please substitute page 6 in the opinion.
Last word on third line changed from "recanted"
to "latest".

39034, 38272

FEB 16 RECD

SUPREME COURT OF GEORGIA

ATLANTA, February 12, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Henry Arthur Drake v. The State

It is ordered that this Court's judgment of February 9, 1982, be hereby amended to show Clarke, J., concurs in the judgment only.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

Exhibit B

38034, 38272

SUPREME COURT OF GEORGIA

ATLANTA, February 16, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Henry Arthur Drake v. The State

It is ordered that this Court's judgment of February 9, 1982, be hereby amended to show Hill, P. J., concurring specially.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hafford, Deputy Clerk.

Exhibit C

RECEIVED
APR 15 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

NO. 81 6540

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

HENRY ARTHUR DRAKE,

Petitioner,

Vs.

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Petitioner, HENRY ARTHUR DRAKE, who is now confined in the Georgia Diagnostic and Classification Center in Jackson, Georgia, under a sentence of death, asks leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 of this Court.

The Petitioner's Affidavit in support of this motion is attached hereto.

Respectfully submitted,

MARTIN & YOUNG, P.C.

By: John R. Martin
JOHN R. MARTIN

By: Mary J. Wilkes
MARY J. WILKES

ATTORNEYS FOR PETITIONER

504 Grant Building
44 Broad Street, N.W.
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IN THE
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October Term, 1981

HENRY ARTHUR DRAKE,

Petitioner,

Vs.

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF GEORGIA

COUNTY OF BUTTS

I, HENRY ARTHUR DRAKE, Petitioner, hereby state under oath the following:

1. I am a citizen of the United States of America and the Petitioner in the above-entitled action.

2. I desire to seek a review, pursuant to 28 U.S.C. §1257(3), of the judgment entered by the Supreme Court of Georgia on February 12, 1982, affirming the denial of an Extraordinary Motion for New Trial in my case by the Superior Court of Butts County, Georgia, but because of my poverty, I am unable to pay the costs of such a review or to provide security.

3. I believe I am entitled to the redress I seek by such a review, and that such a review presents substantial issues of deprivation of rights secured by the Constitution of the United States.

The nature of the questions to be presented upon such a review are set out in the accompanying Petition for Writ of Certiorari.

I contend that the Supreme Court of Georgia erred in affirming the denial of my Extraordinary Motion for New Trial.

WHEREFORE, Petitioner respectfully prays that he may have leave to proceed in this Court on Petition for Writ of Certiorari in forma pauperis.

FURTHER AFFIANT SAYETH NOT.

Henry A Drake.
HENRY ARTHUR DRAKE

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 9th DAY OF APRIL, 1982.

Mary N Wilkes
NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission Expires June 1, 1985